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MICHAEL RODAK, JR.

In the Supreme Court of the United States

October Term, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION, ET AL.,
Appellants,

v.

ARTHUR DAVIS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

MOTION TO DISMISS OR AFFIRM

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Appellee Joseph T. Ferguson, Auditor of Ohio, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the District Court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

State Constitutional Provisions

Section 6(b) of Article IV is set forth in the Jurisdictional Statement. The following sections of the Ohio Constitution are also involved:

Section 20, Article II:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Section 1, Article IV:

"The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, and such other courts inferior to the supreme court as may from time to time be established by law.

Statement of the Case

Section 20 of Article II of the Ohio Constitution prohibits a public official from receiving an increase in salary during his term in office. This Section provides as follows:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

The people of Ohio by referendum vote adopted a limited exception to the above prohibition. Effective May 7, 1968, Article IV of the Ohio Constitution was amended. Section 6(b) of Article IV, as amended, provides in pertinent part as follows:

"The judges of the supreme court, courts of appeals, and of the courts of common pleas, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office."

Section 1901.11 of the Ohio Revised Code was amended effective June 10, 1968. This amendment increased the compensation of municipal court judges. Malcolm P. Wallace, a municipal court judge, filed for a writ of mandamus in the State Court of Appeals seeking an or-

der that he be paid the increased compensation during his existing term in office. He claimed that Section 6(b) of Article IV, *supra*, excluded him from the prohibition of Section 20 of Article II, *supra*. The Court of Appeals denied the writ.

On appeal, the Supreme Court of Ohio held that under Section 20 of Article II, *supra*, the salary of a municipal court judge could not be increased during term. *State ex rel. Wallace* v. *Celina*, 29 Ohio St. 2d 109 (1972). It also held that the language of Section 6(b), *supra*, did not include and did not apply to municipal court judges. The Court stated that the equal protection argument did not appear in the record below. It was therefore not required to pass upon that issue. However, the Court explained that there were sufficient differences between the courts enumerated in Section 6(b), *supra*, and the municipal court to authorize their separate classification.

Appellants then instituted action in the Federal District Court alleging that Section 6(b), *supra*, denied municipal court judges the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. Appellants did not challenge the validity of Section 20 of Article II, *supra*. Judge Green, at the request of appellants, granted a temporary restraining order which in effect required that municipal court judges be compensated at a rate which included increases in salary within term.

A three-judge court was convened and decided this cause on its merits. The Court found that the actions of the Auditor in directing that municipal court judges be denied an increased salary within their term were proper. It therefore dissolved the temporary restraining order and dismissed the complaint. A copy of the Opinion and Order is contained in the Jurisdictional Statement. The Court in its opinion stated that the Supreme Court of Ohio had already

determined that Section 6(b), *supra*, did not include or apply to municipal court judges. The construction placed upon this Section by the Ohio Supreme Court was binding on the Federal courts. The Court held that even if Section 6(b) were found unconstitutional, appellants would not be entitled to the relief which they requested. Section 20 of Article II, *supra*, would still prohibit a municipal court judge from receiving an increase in salary during his existing term.

Argument

The decision of the District Court does not present any federal questions for review. In effect, the Court found that even if all of the contentions of appellants were correct, they would not be entitled to the primary relief sought. Section 20 of Article II, *supra*, prohibits municipal court judges from receiving an increase in salary within term. Appellants did not challenge the validity of this section. Instead, they claimed that Section 6(b) of Article IV, *supra*, was unconstitutional. Whether or not this section is valid has no bearing on whether appellants are entitled to increases in salary within term. It merely excludes from the prohibition of Section 20 of Article II, *supra*, justices of the Supreme Court and judges of the courts of appeals and courts of common pleas. The Court properly found that even if Section 6(b) were unconstitutional, it would still be unable to grant to appellants increases in salary within term. Appellants would still be subject to the prohibition of Section 20 of Article II, *supra*.

The District Court held that it was bound by the construction of Section 6(b) by the Ohio Supreme Court. See, e.g., *Cramp* v. *Bd. of Pub. Inst., Orange Co., Fla.*, 368 U.S. 278, 285, (1961); *Kingsley Intl. Picture Corp.* v. *Regents*, 360 U.S. 684, 688 (1959). The cases cited in the Jurisdictional Statement and in the amicus brief are not applicable under the circumstances involved herein. *Welsh* v. *United*

States, 398 U.S. 333 (1970) and *Robinson* v. *Johnson*, ... F.Supp. ....., 41 U.S.L.W. 2364 (D. Mass. 1973) involved federal statutes. The review by a federal court of a federal statute is different from its review of a state statute. This Court explained the difference in *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 369-370 (1971). When the validity of a federal statute is challenged on constitutional grounds, a federal court will ascertain whether any construction of the statute is possible which will avoid the constitutional question. However, a federal court may not so construe a state statute. State courts are the final authority on the construction of state law. See, also, *Gooding* v. *Wilson*, ... U.S. ....., 92 S.Ct. 1103, 1105, (1972).

Gomez v. *Perez*, ... U.S. ....., 93 S.Ct. 872 (1973) and *Levy* v. *Louisiana*, 391 U.S. 68 (1968) came to the Supreme Court from state courts. In neither case did the Court substitute its construction of the statute for that of the state. The Court in both cases merely held that the statute as construed by the state court was unconstitutional.

Although the District Court did not reach the issue, the classification involved herein is clearly permissible under the criteria established by this Court. The classification does not employ a suspect criterion such as race. Neither does it infringe upon a constitutionally protected interest such as the right to privacy or the right to travel. The classification must therefore be upheld unless no state of facts reasonably may be conceived to justify it. See, e.g., *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

As the Supreme Court of Ohio explained in its opinion, there are sufficient distinctions between municipal court judges and the judges enumerated in Section 6(b), *supra*, to justify separate classifications (29 Ohio St. 2d at 113-114). One obvious difference is the fact that the courts

enumerated in Section 6(b) are specifically established by the Constitution. See Section 1 of Article IV, Ohio Constitution. Municipal courts, as well as county courts, mayors courts and police courts, are created by statute. The power of the General Assembly with regard to constitutional courts is limited. These courts cannot be created or abolished by the legislature. With regard to statutory courts, however, there are no such limitations. The General Assembly might therefore abolish such courts, including municipal courts, at any time.

Appellants' objection to Section 6(b), *supra*, is that it is not broad enough. This is not a sufficient basis to find the provision unconstitutional. In similar situations this Court has held that a state may proceed one step at a time and need not "strike at all evils at the same time." *McDonald* v. *Bd. of Elec. Comrs.*, 394 U.S. 802, 811 (1969); *Schilb* v. *Kuebel*, 404 U.S. 357, 364 (1971).

WHEREFORE, Appellee respectfully submits that the decision of the District Court is clearly correct and that the questions upon which this cause depend are so unsubstantial as not to need further argument. Appellee respectfully moves the Court to dismiss this appeal or in the alternative to affirm the judgment entered in the cause by the District Court.

Respectfully submitted,

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